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No. 85-441
No. 85-460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRVING GILBERT, et al., and
LILLIAN ROBERTS, as Commissioner of Labor
of the State of New York,

Appellants,

– against –

BURLINGTON INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF APPELLEE BURLINGTON INDUSTRIES, INC. TO DISMISS OR AFFIRM

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MOTION OF APPELLEE BURLINGTON INDUSTRIES, INC. TO DISMISS OR AFFIRM

The appellee Burlington Industries, Inc. respectfully moves to dismiss the appeal or affirm the judgment of the United States Court of Appeals, pursuant to Rule 16(1)(a), (c) and (d) of the Rules of this Court.

I

NATURE OF THE CASE

These appeals concern the scope of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001 *et seq.*, as amended.*

In January of 1982 Burlington Industries, Inc. ("Burlington") sold its socks and hosiery divisions to Kayser-Roth Corporation as going concerns. (A-22.)** The individual appellants are all former Burlington employees who remained in their jobs after the sale. (*Id.*)*** Each individual appellant continued to perform the same work he or she had done for Burlington and each received at least the same salary. (*Id.*) Nevertheless, the individual appellants alleged before the New York State Department of Labor that they were entitled to severance benefits.

The Commissioner of Labor of the State of New York (the "Commissioner"), also an appellant here, without holding a hearing, issued orders under Section 198-c of the New York Labor Law**** requiring Burlington to pay over $600,000 in severance benefits to the appellants. (A-7; CA-651.)

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* This motion relates to two separate appeals from the same judgment entered by the Second Circuit on June 17, 1985. The individual appellants' appeal has been assigned docket number 85-460; the appeal of Lillian Roberts, Commissioner of Labor of the State of New York, has been assigned docket number 85-441.

** Citations to the Joint Appendix to the appellants' Jurisdictional Statements are designated as "(A-)"; citations to the Joint Appendix before the Second Circuit are designated as "(CA-)".

*** Any former employee whose job was eliminated as a result of the sale was given severance pay pursuant to Burlington's written severance benefit policy.

**** Section 198-c provides that an employer who violates an "agreement" to provide benefits or wage supplements, including severance benefits, commits a misdemeanor. N.Y. Labor Law §198-c.

Pending Burlington's appeal of the Commissioner's decision to a state review board, the individual appellants commenced this action in the District Court for severance benefits under state law and, alternatively, under ERISA because, they alleged, "the case is governed either by state statutory and common law or by ... ERISA, but probably not by both." (A-25.) The Commissioner intervened demanding that Burlington pay severance benefits to the individual appellants in accordance with Section 198-c. (A-7.)

Burlington moved to dismiss all of the state law claims as being preempted by ERISA and for summary judgment on the ERISA claims. Burlington also moved for an injunction prohibiting further proceedings before the New York State Department of Labor and prohibiting the Commissioner from enforcing the orders she had issued under Section 198-c. (A-31.)

Submissions to the District Court demonstrated that Burlington's Policy Manual, available to all employees, defined the company's policy regarding severance benefits.* (CA-107, 198, 205.) The relevant eligibility provisions required both termination from Burlington and "job elimination". (A-5-6.) This language was used to exclude from the policy's coverage employees involved in a plant or division sale who would thereby be terminated from Burlington's payroll, but whose jobs would be preserved under a new employer. (CA-108-09.) Such employees, who would not be faced with unemployment, were not the intended beneficiaries of Burlington's severance benefit policy and the policy was drafted in a manner which would avoid providing them with a benefit windfall. (CA-507, 522-23.) Burlington consistently interpreted its policy to require both termination from Burlington's payroll and elimination of the employee's job. (CA-113, 461.)

Burlington's Office of Personnel Administration administered its severance benefit policy. (CA-103, 205-06.) The Director of Personnel Administration considered himself and his office to be

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* Eligible employees would receive severance payments equivalent to an amount up to twelve months' of their salary, depending upon their age and length of service to Burlington. (A-6.)

a fiduciary with respect to administration of the policy. (CA-247, 254.) Procedures for processing severance benefits were well established.* Severance payments were made to eligible employees out of Burlington's general assets. (CA-401.)

The District Court dismissed the state law claims and issued an injunction prohibiting state proceedings under Section 198-c. The Court held first that:

> the plain language of §1002(1) [of ERISA] encompasses severance pay plans such as the one set forth in Burlington's policy manual: it is a plan, established by an employer, for the purpose of providing an unemployment benefit to its participants, the Burlington employees, through the use of general corporate assets.

(A-28.)

The District Court concluded that since ERISA preempts all state laws which "relate to" any employee benefit plan covered by ERISA, Burlington was entitled to a final judgment dismissing all state law claims, both statutory and common law, and to an injunction and stay of enforcement of the orders issued by the Commissioner.**

The issue of the individual appellants' eligibility for severance benefits, having been reserved for decision by the District Court,

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* Personnel administrators reviewed termination documents to determine whether eligibility criteria were met. (CA-203.) Review of the eligibility decisions of those adminstrators was then undertaken by Burlington's Office of Personnel Administration. (CA-221-22.) Terminated employees who were not deemed eligible for severance benefits were so notified and adverse decisions could be appealed through existing grievance procedures. (CA-229-31, 427, 569-70.) Grievance procedures were outlined at induction and orientation sessions, were posted, and were published in Burlington's employee handbook. (CA-569-70.) Grievances stated in writing were responded to in writing. (CA-571.)

** The District Court denied that portion of Burlington's motion which sought dismissal or summary judgment with respect to the individual appellants' ERISA claims, with leave to renew at the conclusion of any additional discovery on those claims. (A-31.)

was not before the Second Circuit and is not before this Court. The issues addressed by the Court of Appeals concerned the scope and coverage of ERISA and its preemptive effect concerning the appellants' state statutory and the individual appellants' common law claims.* (A-8.)

The Court of Appeals unanimously affirmed the District Court in all respects. It held that Burlington's unfunded severance benefit policy, as administered by the company was an "employee welfare benefit plan" under Section 1002(1) of ERISA which defines that term. (A-10.) In so holding, the Second Circuit noted not only the reasonableness of United States Department of Labor regulations which address this issue and expressly include severance benefit arrangements within the scope of Section 1002(1), but also the numerous, uniformly congruent decisions of other federal courts. (A-10-11.)

Since Burlington's severance benefit policy plan fell within ERISA's coverage, and since ERISA supercedes all state laws which "relate to" a welfare benefit plan, 29 U.S.C. §1144(c)(2), the Court of Appeals affirmed the District Court's dismissal of the appellants' state law claims and its issuance of the injuction against the Commissioner on the ground of federal preemption. (A-13-17.)

In this Court neither the individual appellants nor the Commissioner have pursued their contention that the laws under

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* The Second Circuit summarized the issues on appeal as follows:

> This appeal presents three principal questions: first, whether the district court was correct in holding that an unfunded severance pay policy is an ERISA plan under either §1002(1)(A) or §1002(1)(B); second, if Burlington's severance policy is an ERISA plan, whether the plaintiffs' state law claims and §198-c (insofar as it applies to severance plans) are preempted; finally, whether Burlington should be estopped from raising a defense of preemption because it allegedly never sought to comply with ERISA's protective reporting and disclosure requirements.

(A-8.)

which their claims were asserted did not "relate to" Burlington's severance benefit plan within the meaning of ERISA's preemption provision. (Jurisdictional Statement of Gilbert, *et al.* at 7-8 n.7; *see* Commissioner's Jurisdictional Statement generally.) Thus, the sole issue before the Court, as framed by the appellants, is the construction of the term "employee welfare benefit plan" within the meaning the ERISA. (*Id.* at i.) Burlington contends that this issue is not properly before the Court.

II

MOTION TO DISMISS

Burlington moves to dismiss the appeals on the ground that there is no basis for them pursuant to 28 U.S.C. §1254(2). Furthermore, even treating the jurisdictional statements as petitions for certiorari, the petitions should be denied due to the absence of any conflict of decisions or any substantial federal question.

Invocation of 28 U.S.C. §1254(2) is improper because (a) a state statute was not invalidated, (b) the individual appellants seek to have this Court review the dismissal of their non-statutory claims which can only be reviewed after a grant of certiorari, and (c) the only issue raised concerns the construction of a federal statute.

The court below did not hold that the state statute at issue, Section 198-c of the New York Labor Law, was invalid. It held that the appellants' statutory and common law claims under state law were preempted by ERISA, and that the Commissioner's exercise of authority over Burlington's severance benefit plan was improper. (A-13, 16, 25, 31.)

Since Section 1254(2)'s jurisdictional grant is to be narrowly construed, *Silkwood v. Kerr-McGee Corp.* (*"Silkwood"*), ____ U.S. ____, 104 S.Ct. 615, 620 (1984), the fact that Section 198-c of the New York Labor Law remains in effect, uninvalidated by the court below, deprives this Court of appellate jurisdiction. The decision below is therefore reviewable only by writ of certiorari. *See Silkwood*, 104 S.Ct. at 620-21; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 953 (1983); *Hanson v. Denckla*, 357 U.S. 235, 244 (1958)(involving the Court's jurisdiction under 28 U.S.C. §1257); *Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976), *cert. denied sub nom. Minnesota v. Alexander*, 430 U.S. 977 (1977) (in which this Court dismissed an appeal for want of jurisdiciton from a decision holding that a state statute invaded the Federal Government's immunity from unconsented state regulation and was therefore unenforceable.)

This case is similar to *Silkwood, supra*, in which this Court held that Section 1254(2) jurisdiction was improper where the appeal was from a Court of Appeals decision vacating a jury's award of punitive damages, which had been based upon an Oklahoma statute, on the ground of federal preemption. The Court explained that "[w]hile the award itself was struck down, the statute authorizing such awards was left untouched." 104 S.Ct. at 621. Such is the case here. The appellants' claims under state law were dismissed and the Commissioner was enjoined from acting under Section 198-c, but the laws themselves were not invalidated. Since "[j]urisdiction under 28 U.S.C. §1254(2) is properly invoked only where a court of appeals *squarely* has 'held' that a state statute is unconstitutional..." or repugnant to a federal statute, *Burger King Corp. v. Rudzewicz*, ____ U.S. ____, 105 S. Ct. 2174, 2181 n.12 (1985) (emphasis in original), Section 1254(2) jurisdiction is improper here.

Even if the Second Circuit's decision could be deemed an invalidation of Section 198-c, the individual appellants' attempt to have this Court review the dismissal of their non-statutory claims under Section 1254(2) is improper because review under that jurisdictional statute is expressly limited to judgments invalidating state statutes. The individual appellants had no private right of action under a state statute, however, and therefore have no standing to appeal under Section 1254(2). During the pendency of the District Court action, the New York Court of Appeals held that Section 198-c does not support a private right of action such as the individual appellants asserted in their complaint.* *See Stoganovic v. DiNolfo*, 61 N.Y.2d 812 (1984), *aff'g* 92 A.D.2d 729, 461 N.Y.S.2d 121 (4th Dept. 1983). *See also Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 543 (1984); *Sasso v. Vachris*, 106 A.D.2d 132, 482 N.Y.S.2d 875, 881 (2d Dept. 1984)("[t]he Court of Appeals recently indicated that no civil cause of action is to

* The courts of New York have not ruled on the availability of a private right of action to the Commissioner. In light of the absence of a statutory predicate, however, it seems likely that such a claim would not be cognizable.

be implied from section 198-c of the Labor Law [citation omitted]. Thus, any pre-emption or jurisdiction question with respect to this statute is academic.")*

The individual appellants concede in their jurisdictional statement that "... the question presented is technically within the Court's certiorari jurisdiciton." (Jurisdictional Statement of Gilbert, *et al.* at 1 n.1.) However, far from being a mere "technical" joinder of the Court's appellate jurisdiction with its certiorari jurisdiction, the Court's appellate jurisdiction in this case exists only by virtue of the improper joinder. Absent such joinder the individual appellants' case would be academic.

Finally, the appellants misapply Section 1254(2) because their jurisdictional statements raise only a narrow issue of statutory construction, *to wit*, whether the provisions of this particular employer's severance benefit policy constitute an "employee welfare benefit plan" under ERISA? (Jurisdictional Statements at i.) Similar issues have been addressed in cases where preemption was not an issue. Indeed, the individual appellants have expressly abandoned the preemption issue addressed by the Second Circuit. (Jurisdictional Statement of Gilbert, *et al.* at 7-8 n.7.) Accordingly, their reliance upon Section 1254(2) is improper and, again, certiorari is the only appropriate mechanism for review by this Court.

Furthermore, even if the present appeals were treated as petitions for certiorari, review by this Court would not be appropriate. Neither a conflict of decisions nor a substantial federal question exists, as shown in the following discussion on Burlington's alternative motion to affirm.

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* Although the individual appellants' complaint asserted claims under two North Carolina statutes, these laws do not govern their rights to severance benefits for reasons unrelated to federal preemption and the dismissal of their claims under these laws is not a part of their appeal.

III

MOTION TO AFFIRM

Alternatively, Burlington moves to affirm the judgment of the United States Court of Appeals for the Second Circuit. The sole issue raised before the Second Circuit, and not abandoned here, is whether Burlington's written severance benefit policy, as administered by the company, was an ERISA "plan". This question was addressed by the court below and its resolution of the issue was in conformity with the decisions of four other Circuits and numerous District Courts. The appellants concede the absence of any authority to support their position and are left to argue that these courts have not "truly" addressed the issue and that the grounds for their decisions have not been "impressive". (Jurisdictional Statement of Gilbert, *et al.* at 11.)

A. *No Conflict Of Decisions*

The judgment of the Second Circuit appealed from was an affirmance of a District Court decision which was not only "well-considered" (A-7) but in accord with analagous Fourth, Seventh and Eighth Circuit decisions, *Dhayer v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied sub nom. Sutton v. Weirton Steel Division of National Steel Corp.*, ____ U.S. ____, 104 S.Ct. 2387 (1984), *aff'g* 571 F. Supp. 316, 329-30 (N.D. W. Va. 1983)(holding that an employer's severance benefit policy was a "plan" under ERISA); *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209, 1211 (7th Cir. 1983); *Pinto v. Zenith Radio Corp.*, 618 F.2d 110 (7th Cir. 1980)(table), *aff'g* 480 F. Supp. 361 (N.D. Ill. 1979)(holding that a severance pay policy set forth in a policy manual was a "plan" covered by ERISA); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), *cert. denied sub nom. Dependahl v. Kalmanovitz*, 454 U.S. 1084 (1981), *aff'g* 491 F. Supp. 1188 (E.D. Mo. 1980)(to the same effect), and extensive district court authority, *Odgen v. Michigan Bell Telephone Co.*, 571 F. Supp. 520 (E.D. Mich. 1983); *Jung v. FMC Corp.*, ____ F. Supp. ____, No. C-82-0018-WAI (N.D.. Cal. April 28, 1983); *Armco, Inc. v. Ludwick*, 3 E.B.C. 1574 (D. Kan. 1982) (holding that an employer's supplemental unemployment benefit

plan was covered by ERISA); *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357, 1362 (D.N.J. 1982) (holding that "an internal policy statement that allowed severance pay as a purely discretionary matter" was a "plan" under ERISA); *Donnelly v. Aetna Life Insurance Co.*, 465 F. Supp. 696, 698 (E.D. Pa. 1979) (holding that a severence pay policy set forth in a policy manual was a "plan" covered by ERISA); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 359 (E.D. Mo. 1979) (to the same effect).

After the District Court's decision, but prior to resolution of the appeal by the Second Circuit, the Ninth Circuit rendered three opinions, each holding that an employer's unfunded severance benefit policy can constitute a "welfare benefit plan" under ERISA. *Jung v. FMC Corp.*, 755 F.2d 708, 710 and n.2 (9th Cir. 1985); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1984), *cert. denied*, ____ U.S. ____ (October 7, 1985). *Cf. Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1520-21 (11th Cir. 1985).

Shortly after the Second Circuit's decision, the Fourth Circuit decided *Slack v. Burlington Industries, Inc.* ("*Slack*"), ____ F.2d ____, No. 84-2241 (4th Cir. September 3, 1985). This case, concerning the identical severance benefit policy and involving the same sale of divisions by Burlington, held that Burlington's policy was an ERISA "plan" and that the state law claims asserted by a separate group of former Burlington employees were preempted by ERISA.* Slip op. at 10-19.

Several subsequent District Court decisions have reached the same result regarding other severance benefit policies. *Pabst Brewing Co. v. Anger*, 610 F. Supp. 214 (D. Minn. 1985); *Adcock v. Firestone Tire & Rubber Co.*, ____ F. Supp. ____, No. 3-83-0037 (M.D. Tenn. August 6, 1985); *DiCarlo v. Supermarkets General Corp.*, ____ F. Supp. ____, No. 83 Civ. 8236

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* In *Slack*, the Fourth Circuit also affirmed the District Court's grant of summary judgment to Burlington on the issue of the plaintiff's entitlement to severance benefits. Slip op. at 23-26.

(S.D.N.Y. May 31, 1985); *Ridens v. Voluntary Separation Program*, 610 F. Supp. 770 (D. Minn. 1985).

Thus, at the present time at least five Circuits and numerous District Courts have decided the issue presented by these appeals in like manner. Two Circuits have addressed the identical issue and have reached the same conclusion, based upon the same reasoning, without a dissent. The appellants have failed to cite the Court to even a single decision under federal law decided to the contrary, and Burlington is aware of none. (*See* Appendix "B" to the Jurisdictional Statement of Gilbert, *et al.*) It is therefore manifest that the Court's consideration of this case would be inappropriate on the basis of a conflict of decisions.

B. *No Substantial Federal Question*

The question presented on this appeal is so unsubstantial as not to require further argument.

1. *Decision Expressly Limited to Severance Benefits*

Contrary to the individual appellants' assertion, the Second Circuit did not give the statutory term "plan" an "infinitely expansive construction ..." encompassing "virtually every aspect of the employer-employee relationship...." (Jurisdictional Statement of Gilbert, *et al.* at 10-11.) The Court of Appeals carefully limited its holding, distinguishing severance benefits from other types of benefits and "payroll practices" which, it said, may not be covered by ERISA. (A-13.)

This distinction is consistent with United States Department of Labor regulations and decisional law interpreting ERISA. Regulations codified at 29 C.F.R. §2510.3-1 provide that unfunded benefit arrangements normally associated with compensation such as overtime pay, shift premiums, disability pay, holiday pay, and compensation for periods of absence due to military service and service as a juror, are not encompassed by the definition of "employee welfare benefit plan" within the meaning of ERISA. 29 C.F.R. §2510.3-1(b). In contrast, this

same regulation expressly provides that arrangements for the payment of severance benefits are within ERISA's scope. 29 C.F.R. §2510.3-1(a)(3).*

In *Scott v. Gulf Oil Corp.*, *supra*, the Ninth Circuit sustained the reasonableness of this construction of ERISA, explaining that severance benefits are uniquely appropriate for ERISA coverage due to the danger of default in the context of large scale terminations. Such danger does not exist for benefits payable during the course of employment such as for medical leaves or vacations.** 754 F.2d at 1503.

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* In the opinion below, the Second Circuit noted that the lengthy list of benefits excluded from ERISA's coverage set forth at 29 C.F.R. §2510.3-1(b)(3) "was not mean[t] to be exhaustive" (A-13), thereby indicating that most, if not all, types of unfunded benefit arrangements, other than for the payment of severance benefits, would fall outside the coverage of ERISA. The court's reference to this regulation directly refutes the Commissioner's assertion that the Second Circuit's construction of ERISA could be deemed to include plans which provide for paid holidays and sick leave (Commissioner's Jurisdictional Statement at 8), since the regulation expressly excludes paid holidays and sick leave from the definition of an "employee welfare benefit plan." 29 C.F.R. §2510.3-1(b).

** The Ninth Circuit reasoned that:

> [A]n employer who ... terminates a large number of employees at once, may be faced with an extremely large severance liability. For these reasons, the danger that an employer may, because of lack of funds, default on an obligation to provide severance pay is greater than the danger of default on an obligation to provide medical leaves or vacations. This type of default is a central concern of ERISA. [Citation omitted.] Therefore, it is reasonable for the Labor Department regulations to include severance pay, even when funded out of an employer's general assets. as an employee welfare benefit under ERISA, while excluding medical leaves, vacations, etc., as 'payroll practices' when similarly funded.

754 F.2d at 1503.

In *California Hospital Ass'n v. Henning*, ____ F.2d ___, Nos. 83-6381; 83-6416 (9th Cir. September 6, 1985), the Ninth Circuit gave effect to its earlier reasoning in *Scott*, holding that vacation pay arrangements are not "plans" within the meaning of ERISA. Significantly the court distinguished vacation pay from severance pay in light of ERISA's purpose. In *Slack*, *supra*, the Fourth Circuit also recognized the distinction between severance benefit plans, which are subject to ERISA, and other types of benefit plans, which are not. Slip op. at 14.

Thus, the individual appellants' assertion that the decision below means that ". . . virtually every aspect of the employer-employee relationship is covered by ERISA" (Jurisdictional Statement of Gilbert, *et al.* at 11) is not only contradicted by the opinion below, but by those decisions which have followed it.

2. *Lower Federal Courts Have Not Failed To Address The Definitional Issue Raised by Appellants*

A second mischaracterization in the individual appellants' jurisdictional statement is their assertion that the courts below, and other courts, have failed to address the issue of what is an ERISA "plan"? Although this was not the only issue raised by the appellants below, they have limited their appeals to this question, contending that no court has ever "truly" addressed it. (Jurisdictional Statement of Gilbert, *et al.* at 11.) This is simply false.

To begin with, the statute itself defines the terms "employee welfare benefit plan" and "welfare plan" to mean:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical,

> or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in Section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).*

29 U.S.C. 1002(1).

The Ninth and Eleventh Circuits have given the parameters of this definition detailed, generic treatment. *See Scott v. Gulf Oil Corp.*, 754 F.2d at 1503-04; *Donovan v. Dillingham*, 688 F.2d 1367, 1372-73 (11th Cir. 1982) (*en banc*).** Numerous other courts, such as those below, have addressed the limited definitional issues left unanswered by the statute through an analysis of the specific plans before them.

In this case, the Second Circuit need not have undertaken yet another lengthy exposition of this issue because such treatment was not warranted by the facts. Burlington had a written plan document with well-defined eligibility criteria. During the relevant time period, Burlington consistently applied

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* This provision refers to benefits in Section 302(c) of the Labor Management Relations Act of 1947, 29 U.S.C. §186(c). United States Department of Labor regulations state that Section 302 duplicates to a large extent the benefits enumerated in Section 3(1)(A) of ERISA, 29 U.S.C. §1002(1)(A), except that Section 302 adds holiday and severance benefits. 29 C.F.R. §2510.3-1(a)(3).

** In *Donovan v. Dillingham*, the Eleventh Circuit, after a lengthy analysis, identified the requisites of a "plan, fund or program" as follows:

> In summary, a 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.

688 F.2d at 1373.

and adhered to those criteria. Procedures for the processing of severance benefits were well established. Employees were notified of the benefits available to them prior to the sale of the divisions. Notification and grievance procedures were in existence.

To the extent that Burlington may have failed to technically adhere to all of ERISA's many reporting and disclosure requirements, the individual appellants' raised this issue below in terms of whether Burlington should be estopped from asserting the defense of preemption. The estoppel issue was given considerable attention by the Second Circuit which held that estoppel was not an appropriate or desireable remedy. The Court left the underlying issue of whether such alleged violations constituted arbitrary and capricious conduct to the District Court. (A-17-19.) This holding is, again, in conformity with consistent decisional law. *See Blau v. Del Monte Corp.*, 748 F.2d at 1352; *Donovan v. Dillingham*, 688 F.2d at 1372; *Dependahl v. Falstaff Brewing Corp.*, 491 F. Supp. at 1195.

3. *The Decision Below Effectuated Congressional Intent Of Uniform Enforcement of Severance Benefit Plans Under Federal Law*

It is ironic that in conjunction with this appeal the individual appellants ask the questions "Is the state common law of contracts . . . dead?" and "Are state wage collection and benefit enforcement statutes soon to be extinct?" (Jurisdictional Statement of *Gilbert, et al.* at 23), for these appellants would have been without a judicial remedy were they to have relied upon such state laws alone. As explained above, the New York Court of Appeals has held that Section 198-c of the New York Labor Law does not give rise to a private civil action such as the individual appellants asserted below. Furthermore, the individual appellants' common law contract claim would have failed under

well-established principles of New York law.* Thus, ERISA provided the individual appellants with their only cognizable claims for relief and this is why they themselves commenced an action in the District Court asserting claims under ERISA.

Furthermore, it is the patchwork of inconsistent state laws enforcement mechanisms which Congress, in enacting ERISA, sought to replace with a comprehensive federal enforcement scheme. The individual appellants' common law claim that a contract to provide severance benefits may be implied from handbooks and manuals is viewed differently in nearly every state.** Employees fair no better under state statutory law. Two

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* Under New York law neither an employee handbook nor a policy manual constitute an agreement which can be enforced against the employer which publishes those documents. *King v. Cornell University*, 81 A.D.2d 712, 439 N.Y.S.2d 445 (3d Dept. 1981); *Edwards v. Citibank, N.A.*, 74 A.D.2d 553, 554, 425 N.Y.S.2d 327, 328-29 (1st Dept. 1980); *Marinzulich v. National Bank of North America*, 73 A.D.2d 886, 424 N.Y.S.2d 1014 (1st Dept. 1980); *Chin v. American Telephone & Telegraph Co.*, 96 Misc. 2d 1070, 1072-73, 410 N.Y.S.2d 737, 739 (Sup. Ct. N.Y. Cty. 1978), *aff'd n.op.*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dept. 1979).

** While some states hold that such manuals generally constitute binding contracts, *e.g.*, *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 612-19 (1980); *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 540-41 (1949); *Dahl v. Brunswick Corp.*, 277 Md. 471, 476 (1976), other states hold that manuals and policy statements are not binding, *e.g.*, *Gates v. Life of Montana Insurance Co.*, 196 Mont. 178, 183 (1982); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 55 (1976); *Heideck v. Kent General Hospital, Inc.*, 446 A.2d 1095 (Del. 1982). Still other states engage in no presumption, permitting the intent of the parties to govern the determination completely. *See, e.g.*, *Smith v. Kerrville Bus Co., Inc.*, 709 F.2d 914 (5th Cir. 1983) (construing Texas law); *Gee v. Federal Express Corp.*, 710 F.2d 1181 (6th Cir. 1983) (applying Tennessee law, allowing employer to set terms for discharge); *Griffin v. Housing Authority of Durham*, 62 N.C. App. 556, 557 (1983) (personnel policies are not part of employment contract where not expressly incorporated therein); *Hepp v. Lockheed-California Co.*, 86 Cal. App. 3d 714, 719, 150 Cal. Rptr. 408 (2d Dist. 1978). Finally, even in those states where manuals have been held to be binding, some states have upheld employers' express disclaimers of intent to be bound. *E.g.*, *Batchelor v. Sears, Roebuck & Co.*, 574 F. Supp. 1480, 1484-85 (E.D. Mich. 1983).

states have no wage collection statutes at all; eight states do not have any statutory administrative enforcement provisions for the collection of wages which would encompass severance benefits; and fourteen additional states have no statutory provisions for the collection of severance benefits (as opposed to salary). (*See* "Analysis of Administrative Wage Collection Authority In The Fifty States", at a-xvii of Burlington's Brief before the Second Circuit.) In addition, the statutory authority for administrative wage collection appears to be doubtful in several other states.

Thus, when the varied state laws relating to an employer's common law contractual obligations are considered with this haphazard state statutory scheme, the value of a national system of regulation is evident. National uniformity is particularly important, where, as here, a multi-state plan is at issue. In the decision below, the Second Circuit stated:

> ...the plaintiffs here were employed in 16 different states. The policy favoring national uniformity in this field, therefore, strongly supports preemption.

(A-15)

The individual appellants and the Commissioner, preoccupied with illusory contradictions and unintended effects purportedly wrought by ERISA's preemption provision, simply ignore the effective federal system that Congress has created. Thus, ERISA provides for meaningful disclosure to plan participants, 29 U.S.C. §1133, and imposes fiduciary standards on those with discretion regarding covered plans, 29 U.S.C. §1104. The Secretary of Labor is empowered to investigate alleged violations of the Act, 29 U.S.C. §1134, and to commence suit in an appropriate District Court to enforce the Acts, 29 U.S.C. §1132(a) (2), (4), (5), (6). Plan participants are also entitled to commence civil actions, and can recover, in the court's discretion, a reasonable attorney's fee. 29 U.S.C. §1132(g).

Therefore, the asserted absence of administrative processes and the claimed need to institute expensive civil litigation to recover severance benefits are nothing more than the appellants' inventions conjured up in an attempt to persuade this Court that employees will be left without adequate remedies if the decision below is affirmed. The fact is that the individual appellants here, and a majority of employees throughout the country, can only benefit by a decision which will permit the United States Department of Labor and, if necessary, the federal courts to enforce the provisions of severance benefit plans.

In any event, as the Fourth Circuit observed in *Slack* "[t]he fact that employees may sometimes wish to forego these advantages of ERISA coverage in favor of arguably more generous state statutes does not allow us to escape the clear direction of Congress." Slip op. at 15.

4. *No Conflict Between The Decision Below And Any Decision Of This Court*

The individual appellants and the Commissioner, relying heavily upon an incorrect analysis of a decision of this Court which Justice Powell characterized as having "little consequence beyond the resolution of this case," argue that the decision in *Nachman Corp. v. Pension Benefit Guaranty Corp. ("Nachman")*, 446 U.S. 359 (1980), can be read to establish an exception to ERISA's preemption provision for direct employer liability in common law contract. *Id.* at 397 (Powell, J. dissenting). This issue did not arise, was not addressed, and was not decided in *Nachman*, but was subsequently addressed by the Third Circuit in *Murphy v. Heppenstall Co. ("Murphy")*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982).

Murphy, like *Nachman*, arose out of a collective bargaining agreement under which the employer agreed, and then failed,

to fund adequately a pension plan.* 635 F.2d at 234-37. Again, as in *Nachman*, the plaintiffs in *Murphy* sought to establish the employer's liability, as opposed to the plan's liability, under the pension agreement. *Id.* Finding that any state law claims would be preempted by ERISA, the court nevertheless considered and rejected the employer's contention that the employees' contract claim was preempted. The basis for this decision was not, as the appellants suggest, that state common law contract claims are excepted from ERISA's preemption provision, but rather that the employees' claim was not a state law claim at all. The court explained:

> 29 U.S.C. §1144 supersedes 'state law relating to' a pension plan. *The employees' contract claim against the employer is not a state law claim.* Rather, their claim arises under both the federal common law of labor-management contracts, and the federal common law of pension plans. *Because the employees are seeking to enforce a provision of a collectively bargained pension agreement, federal common law applies."*

Id. at 237 (footnote omitted and emphasis supplied).

Thus, when, in rejecting the appellants' argument below, the Court of Appeals stated that "[t]he short answer is that *Nachman* and its progeny were based on federal rather than state law", the Court was completely correct. (A-16.) There is no apparent conflict between the decision below and *Nachman* and none of the "consequences" which the appellants foresee arising out of the decision below are expressed in or would arise from the Second Circuit's opinion. Such unsupported prognostications

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* *Nachman* and *Murphy* are pension cases involving interpretations of Title IV of ERISA, §§4001-4082, 29 U.S.C. §1301 *et seq.* "Employee welfare benefit plans" are not governed by Title IV of ERISA and cases interpretating Title IV are therefore without application to severance plans like Burlington's. *Gutting v. Falstaff Brewing Corp.*, 541 F. Supp. 345, 347 (E.D. Mo. 1982), *rev'd on other grounds*, 710 F.2d 1309 (8th Cir. 1983).

as resultant age discrimination (Jurisdictional Statement of Gilbert, *et al.* at 22) were not raised by the appellants below and are completely outside the record.

5. *No Conflict Between The Decision Below And Any Regulation Of The Department Of Labor*

Finally, the Commissioner argues that the Second Circuit's holding is in conflict with interpretative regulations of the United States Department of Labor codified at 29 C.F.R. §2510.3-1. As indicated above, this regulation excludes certain specific "payroll practices" from ERISA's coverage because they are not considered "welfare benefit plans". Although the Commissioner concedes that this regulation does not expressly mention severance benefits, she argues that because the list of benefits included in the regulation was not meant to be exhaustive and because severance benefits are similar in nature to the listed benefits, severance benefits should be excluded from ERISA's coverage.

The Commissioner omits from her argument the fact that this very regulation provides that the effect of Section 1002(1)(B) of ERISA "is to include within the definition of 'welfare plan' those plans which provide ... severance benefits ...." 29 C.F.R. §2510.3-1(a)(3). Also omitted from the Commissioner's argument is reference to the agency's statement in 1979 that "since the provision of severance pay is one of the recognized purposes for a welfare plan under [Section 1002(a)], it would seem that severance pay plans would in virtually all cases be welfare plans ...." 44 Fed. Reg. 11763 (March 2, 1979).

Any doubt as to the Congressional intent that severance benefits be subject to ERISA was dispelled in 1980 when Congress added the language found at 29 U.S.C. §1002(2)(B):

> The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter

> providing one or more exempt categories under which — (1) severance pay arrangements . . . shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans.

As the Fourth Circuit observed in *Slack* "[t]his amendment, adopted after the Secretary of Labor had promulgated the regulations [codified at 29 C.F.R. §2510.3-1], effectively sanctioned these regulations by statute and provided that severance pay arrangements whether treated as pension plans or welfare plans would be subject to the Act." Slip op. at 13.

C. Conclusion

Since the decision below is amply supported by logic and precedent, is in conformity with the decisions of the many other Courts of Appeals which have considered the matter, and raises no substantial federal question, the judgment below should be affirmed.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the court below affirmed.

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Respectfully submitted,

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